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COLLATERAL ESTOPPEL: THE EXTENT TO WHICH DECISIONS OF THE WORKMEN'S COMPENSATION APPEALS BOARD AND MUNICIPAL OR COUNTY PENSION BOARDS BIND EACH OTHER

In recent years, California's Workmen's Compensation Act has elicited voluminous commentary. One aspect, however, has received comparatively little attention: The collateral estoppel effect of Workmen's Compensation Appeals Board¹ decisions on the administration of pension plans for employees of California municipal corporations and counties.

The problem can be clarified by example. Suppose an employee is covered by both workmen's compensation and a county or municipal pension plan. Assume that recovery under the pension plan is predicated, as it is under workmen's compensation, upon a finding that the employee suffered a service-incurred disability. If the Workmen's Compensation Appeals Board (WCAB) determines whether the disability is service-incurred or not, does collateral estoppel make this determination binding upon the pension board? Or, if the pension board is the first to make this determination, must the WCAB respect its decision under collateral estoppel?

It is not particularly surprising that the problem has not been treated exhaustively by legal writers. California's work force exceeds eight million;² yet only a small percentage of these—somewhat over 175,000—are covered by county or municipal pension plans.³ Even so, the matter deserves attention if for no other reason than its importance to those employees, who are covered by more than 34 separate pension systems.⁴ Considering the proliferation of government agencies, the problem should become increasingly relevant in the future.

1. Prior to 1966, the body was known as the Industrial Accident Commission. CAL. LABOR CODE §§ 53, 111, amended by Cal. Stats. 1965, ch. 1513, § 1, 6, 214 at 3555, 3556-57, 3608. Hereinafter, the Industrial Accident Commission will be referred to as the IAC and the Workmen's Compensation Appeals Board as the WCAB.

2. DOCUMENTS SECTION, STATE OF CALIFORNIA, CALIFORNIA STATISTICAL ABSTRACT 19 (1968) [hereinafter cited as DOCUMENTS].

3. See BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, CENSUS OF GOVERNMENTS, Vol. 6, No. 2, EMPLOYEE RETIREMENT SYSTEMS OF STATE AND LOCAL GOVERNMENTS 32-35 (1967). Since the statistics given deal only with pension systems with over 200 members, the number of pension plans in existence exceeds the figures given. Since teachers and judges are covered by different pension systems, they have not been included in the foregoing statistics; nor will they be discussed in this article.

4. See DOCUMENTS, *supra* note 2.

Judicial Character of the Workmen's Compensation Appeals Board and Municipal and County Employee Retirement Associations

By constitutional amendment, the WCAB is a court empowered to receive evidence and pass judgment on all matters within its jurisdiction.⁵ This jurisdiction is limited and exclusive: limited in that the WCAB may not adjudicate matters beyond those enumerated in the Workmen's Compensation Act,⁶ and exclusive because proceedings to secure compensation under the Act "shall be instituted before the appeals board and not elsewhere"⁷ Moreover, the WCAB's judicial status is not diminished by its authority to proceed informally and to adopt rules of evidence that are far less stringent than those binding on other courts.⁸

The judicial status of each municipal and county pension board is less easily defined.

A municipality may lawfully confer quasi-judicial powers on boards or commissions dealing solely with municipal affairs. This power is acquired by municipalities under Article XI, section 8½, subdivision 4 of the Constitution. This provision does not, however, automatically confer quasi-judicial power upon local boards. A municipality must, by charter or ordinance, expressly or im-

5. CAL. CONST. art. 20, § 21 provides: "A complete system of workmen's compensation includes . . . full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this state, binding on all departments of the State government." The IAC's status as a constitutional court was recognized in *Pacific Coast Cas. Co. v. Pillsbury*, 171 Cal. 319, 322, 153 P. 24, 26 (1915), and *Solari v. Atlas-Universal Serv., Inc.*, 215 Cal. App. 2d 587, 593, 30 Cal. Rptr. 407, 410 (1963).

6. *Gerson v. Industrial Acc. Comm'n*, 188 Cal. App. 2d 735, 738-39, 11 Cal. Rptr. 1, 4 (1961); 1 W. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 1.02[9], at 1-13 (2d ed. 1968).

7. CAL. LABOR CODE § 5300. CAL. LABOR CODE § 5301 provides: "The appeals board is vested with full power, authority and jurisdiction to try and determine finally all the matters specified in Section 5300 subject only to the review by the court as specified in this division."

The WCAB shares concurrent jurisdiction with the superior court over one matter only. When an employee simultaneously seeks relief from the WCAB and files a tort action against his employer in superior court, each tribunal shares concurrent jurisdiction to determine whether it has jurisdiction over the subject matter. The tribunal first assuming jurisdiction may restrain the other from proceeding until a final adjudication of the issue has been made; such adjudication is then *res judicata* to the second tribunal. *Scott v. Industrial Acc. Comm'n*, 46 Cal. 2d 76, 82-83, 293 P.2d 18, 22 (1956).

8. CAL. LABOR CODE §§ 5708, 5709; see Bancroft, *Some Procedural Aspects of the California Workmen's Compensation Law*, 40 CALIF. L. REV. 378, 386-90 (1952).

pliedly confer such power upon the board or the power does not exist.⁹

In creating such power, it is unnecessary for the charter or ordinance to make elaborate provisions with respect to hearings by the board.¹⁰ Quasi-judicial status has been inferred from language in a charter that simply provides that awards be made upon presentation of evidence to the "satisfaction" of the board.¹¹

The essential characteristic of the quasi-judicial body is its fact finding power and the concomitant requirement to make a determination or adjudication of fact in connection with matters properly submitted to it after a hearing.¹²

Without this authority, the board is ministerial rather than quasi-judicial.¹³ Once a pension board has quasi-judicial status, though, its findings, if based upon substantial evidence, are binding on courts in the absence of capriciousness or fraud.¹⁴

When authorized by their charters or the legislature, counties may also create quasi-judicial boards to govern their retirement systems.¹⁵ It must be remembered that such pension plans are "municipal af-

9. *Le Strange v. City of Berkeley*, 210 Cal. App. 2d 313, 322, 26 Cal. Rptr. 550, 556 (1962). When a local ordinance states that it is in pursuance of a state retirement statute, it incorporates that act in its entirety. *Klench v. Pension Fund Comm'rs*, 79 Cal. App. 171, 177, 249 P. 46, 47 (1926); cf. *Cole v. City of Los Angeles*, 180 Cal. 617, 182 P. 436 (1919) (incorporation of the Municipal Improvement District Act by a city charter).

10. *See Flaherty v. Board of Retirement*, 198 Cal. App. 2d 397, 407, 18 Cal. Rptr. 256, 263 (1961).

11. *See id.* at 407, 18 Cal. Rptr. at 263; *Ware v. Retirement Bd.*, 65 Cal. App. 2d 781, 792, 151 P.2d 549, 554-55 (1944).

12. *Le Strange v. City of Berkeley*, 210 Cal. App. 2d 313, 323, 26 Cal. Rptr. 550, 556 (1962).

13. *French v. Cook*, 173 Cal. 126, 129, 160 P. 411 (1916); *see Sheehan v. Police Comm'rs*, 197 Cal. 70, 74-75, 239 P. 844, 846 (1925).

14. *See Rau v. Retirement Bd.*, 247 Cal. App. 2d 234, 237, 55 Cal. Rptr. 296, 298 (1966); *Corcoran v. Retirement Bd.*, 114 Cal. App. 2d 738, 740-41, 251 P.2d 59, 60 (1952); *Rogers v. Retirement Bd.*, 109 Cal. App. 2d 751, 757, 241 P.2d 611, 615 (1952); *Dornell v. Retirement Bd.*, 72 Cal. App. 2d 197, 198, 207, 164 P.2d 266, 267, 271 (1946); *Ware v. Retirement Bd.*, 65 Cal. App. 2d 781, 788, 151 P.2d 549, 555 (1944); *Brent v. Retirement Bd.*, 57 Cal. App. 2d 721, 722, 733-34, 135 P.2d 396, 397, 403 (1943).

15. For a discussion of the counties' constitutional authority, *see Byers v. Board of Supervisors*, 262 Cal. App. 2d 148, 155, 68 Cal. Rptr. 549, 554 (1968). Powers constitutionally granted to the counties are found in CAL. CONST. art. III, §§ 1, 7, 7½. Statutes authorizing counties to create retirement systems are: County Employees Retirement Law of 1937, CAL. GOV'T CODE §§ 31450-898; County Peace Officers Retirement Law, CAL. GOV'T CODE §§ 31901-32063; County Fire Service Retirement Law, CAL. GOV'T CODE §§ 32200-365; County Peace Officers and Fire Service Retirement, Disability, and Death Pension Plan Law, CAL. GOV'T CODE §§ 33000-017.

fairs,"¹⁶ and cannot be state-wide in scope.¹⁷ Because of this, the workmen's compensation provisions of the Labor Code prevail over county or municipal ordinances in cases of conflict.¹⁸

The Doctrine of Collateral Estoppel¹⁹

The purpose of collateral estoppel (or "res judicata" as it is frequently called) was discussed in *Bernhard v. Bank of America*:²⁰

The doctrine of res judicata [collateral estoppel] precludes parties or their privies from relitigating a cause of action that has been *finally determined* by a court of competent jurisdiction. Any issue *necessarily* decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action. The rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. The doctrine also serves to protect persons from being twice vexed for the same cause.²¹

Justice Traynor then indicated what criteria must be satisfied for the doctrine to apply:

In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in ques-

16. *Murphy v. Piedmont*, 17 Cal. App. 2d 569, 571-72, 62 P.2d 614, 615, *aff'd*, 64 P.2d 399 (1936) (per curiam), *Klench v. Pension Bd. Comm'rs*, 79 Cal. App. 171, 179-80, 249 P. 46, 48 (1926).

17. In the absence of constitutional amendments such as that which authorized the IAC, there is no constitutional authority to create state-wide, quasi-judicial bodies. Doing so infringes upon CAL. CONST. art. 6, § 1, which vests all judicial power in the courts. *Cf. Drummey v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 81, 87 P.2d 848, 852 (1939); *Standard Oil Co. v. State Bd. of Equalization*, 6 Cal. App. 2d 557, 563, 59 P.2d 119, 119-20 (1936); *Ware v. Retirement Bd.*, 65 Cal. App. 2d 781, 792-93, 151 P.2d 549, 555 (1944). This prohibition against establishment of quasi-judicial bodies does not extend to chartered municipalities and counties, however. *See Standard Oil Co. v. State Bd. of Equalization*, *supra*; *Ware v. Retirement Bd.*, *supra*. Nor has their power in this respect been curtailed by an amendment to article 6, section 1, which removed the legislature's power to create inferior courts other than municipal and justice courts. *Savage v. Sox*, 118 Cal. App. 2d 479, 485-88, 258 P.2d 80, 85 (1953).

18. *Healy v. Industrial Acc. Comm'n*, 41 Cal. 2d 118, 122, 258 P.2d 1, 3 (1953); CAL. CONST. art. 11, § 11.

19. California courts tend to use the generic term "res judicata" quite loosely when referring to what, more properly is collateral estoppel. Hence, when "res judicata" appears in a quotation in this text it is synonymous with collateral estoppel, as opposed to the aspects of bar and merger. *See, e.g., French v. Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953); *Bernhard v. Bank of America*, 19 Cal. 2d 897, 810-11, 122 P.2d 892, 894 (1942).

20. 19 Cal. 2d 807, 122 P.2d 892 (1942); *accord*, *Dow Chem. Co. v. Workmen's Comp. App. Bd.*, 67 Cal. 2d 483, 432 P.2d 365, 62 Cal. Rptr. 757 (1967); *French v. Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953).

21. 19 Cal. 2d at 810-11, 122 P.2d at 894 (emphasis added) (citations omitted).

tion? Was there a final judgment on the merits? Was the party *against* whom the plea is asserted a party or in privity with a party to the prior adjudication?²²

Collateral estoppel "presupposes concurrent and not exclusive jurisdiction" over the subject matter;²³ and if either tribunal lacks such jurisdiction, the doctrine is inapplicable. Therefore, it is germane to consider the extent to which the jurisdiction exercised by the WCAB and by local pension boards is concurrent or mutually exclusive.

It has been argued that where an employee's recovery under both workmen's compensation and a local pension plan is predicated upon the presence of a service-connected disability, the WCAB has *exclusive* jurisdiction to determine the extent and origin of that disability.

[W]here the [WCAB] has jurisdiction, the Pension Board has none, other than as an administrative board which administers retirement benefits in accordance with previously made determinations of the [WCAB]. Where a disability is found to be service connected by the [WCAB], then it is incumbent upon the Pension Board to administer a retirement pension in accordance with such a finding.²⁴

This contention is erroneous. Each tribunal is established "to attain wholly independent objectives."²⁵

Workmen's compensation benefits are predicated upon state policy "that the unfortunate economic results caused by the injury or death of an employee shall, in a measure, be borne by society."²⁶ Both state law²⁷ and the constitution²⁸ endow the WCAB with *exclusive* jurisdiction to adjudicate such claims.

Pension plans serve a different function, which is "in harmony rather than in conflict"²⁹ with workmen's compensation. Such plans are not intended to provide compensation for loss of future income, *per se*; they represent an integral, anticipated portion of a municipal or county employee's salary.³⁰ A pension board must honor this obligation to employees who have become incapacitated. In addition, pension

22. *Id.* at 813, 122 P.2d at 895 (emphasis added).

23. *Pathe v. City of Bakersfield*, 255 Cal. App. 2d 409, 417, 63 Cal. Rptr. 220, 224 (1967).

24. Brief for Appellant at 10, *Pathe v. City of Bakersfield*, 255 Cal. App. 2d 409, 63 Cal. Rptr. 220 (1967).

25. 255 Cal. App. 2d at 414, 63 Cal. Rptr. at 223.

26. *Larson v. Board of Police Comm'rs*, 71 Cal. App. 2d 60, 64, 162 P.2d 33, 35 (1945).

27. CAL. LABOR CODE § 5300.

28. *See* CAL. CONST. art. 20, § 21.

29. 255 Cal. App. 2d at 416, 63 Cal. Rptr. at 224.

30. *Larson v. Board of Police Comm'rs*, 71 Cal. App. 2d 60, 63-64, 162 P.2d 33, 35 (1945); *Sacramento v. Industrial Acc. Comm'n*, 74 Cal. App. 386, 240 P. 792 (1925).

boards bear a further responsibility: "To make certain that these employees will be replaced by more capable employees for the betterment of the public service without undue hardship on the employees removed."³¹

With this basic distinction between the function of the two independent tribunals in mind, it is manifest that the jurisdiction of the Industrial Accident Commission is exclusive only in relation to its own objectives and purposes and at the very most overlaps the subject matter jurisdiction of the pension board on a single issue of fact only³²

In other words, each tribunal has exclusive jurisdiction except for a small sliver of concurrent jurisdiction over one issue: whether a service-connected disability has been sustained.

WCAB Findings Are Binding on Local Pension Boards

Application of Collateral Estoppel: *French v. Rishell*

Prior to adjudication of the landmark case of *French v. Rishell*³³ in 1953, it was by no means certain that collateral estoppel applied to cases in which an injured employee was covered by both workmen's compensation and a county or municipal pension system. Cases dealing with other situations arising under the Workmen's Compensation Act acknowledged that the IAC could make final determinations of fact;³⁴ moreover, IAC findings were "required to be findings of ultimate fact."³⁵ Such findings were deemed res judicata in subsequent proceedings between the same parties and their privies if the same facts were to be adjudicated.³⁶ But no appellate court had held that collateral estoppel was operative when the subsequent proceedings were before a pension board.

Indeed, *Schmidt v. Pension Board*³⁷ held to the contrary—that

31. 255 Cal. App. 2d at 422, 63 Cal. Rptr. at 228.

32. *Id.* at 415, 63 Cal. Rptr. at 223.

33. 40 Cal. 2d 477, 254 P.2d 26 (1953).

34. See *Schaller v. Industrial Acc. Comm'n*, 11 Cal. 2d 46, 50-51, 77 P.2d 836, 838-39 (1938); *Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407, 410-13, 156 P. 491, 493-94 (1916).

35. *Ethel D. Co. v. Industrial Acc. Comm'n*, 219 Cal. 699, 708, 28 P.2d 919, 923 (1934); accord, *Argonaut Ins. Exch. v. Industrial Acc. Comm'n*, 49 Cal. 2d 706, 712, 321 P.2d 460, 464 (1958). CAL. LABOR CODE § 5953 provides: "The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review. Such questions of fact shall include ultimate facts and the findings and conclusions of the appeals board"

36. *Goodman Bros. v. Superior Court*, 51 Cal. App. 2d 297, 301-03, 124 P.2d 644, 646-47 (1942); see *Gerini v. Pacific Employers Ins. Co.*, 27 Cal. App. 2d 52, 54-55, 80 P.2d 499, 501 (1938).

37. 63 Cal. App. 2d 439, 147 P.2d 90 (1944), *overruled*, *French v. Rishell*, 40 Cal. 2d 477, 254 P.2d 25 (1953).

prior determinations of fact by the IAC would *not* bind a municipal pension board. In that case, a Bakersfield fireman succumbed to coronary occlusion while home in bed. The IAC predicated an award to his widow on the finding that the attack arose out of and in the course of the deceased's work. These findings were offered as evidence in a hearing before the Bakersfield City Firemen's Pension Board, but pension benefits were denied on the ground that the death was not service-connected.³⁸ The appellate court held that IAC findings were not res judicata in the pension board proceedings. If they were res judicata, the court reasoned, pension boards would be deprived of authority to administer their funds in the manner prescribed by the city charter.³⁹

In 1953 the California Supreme Court expressly disapproved *Schmidt* in *French v. Rishell*.⁴⁰ French, a captain in the Oakland Fire Department, also died of coronary occlusion. Finding that death "[p]roximately resulted from an injury occurring in the course of and arising out of his employment,"⁴¹ the IAC made an award to French's widow. Subsequently the widow applied to the Firemen's Relief and Pension Fund for benefits pursuant to section 104(1) of the city charter, which stated that the board "[s]hall provide for the family of a member of the Department who may die as a result of an injury or disability incurred while in the performance of his duty"⁴² The pension board, however, refused to recognize the collateral estoppel effect of the IAC's finding and rejected her application. The widow then sought and was granted mandamus to compel the city and its board to grant the pension.

The IAC's award was final and the issue it determined—whether French's death was precipitated by performance of his duties—was the precise question which the pension board was compelled to resolve in granting or denying the pension. The supreme court, therefore, was required to determine only "[w]hether the decision of the Industrial Accident Commission is res judicata and binding upon the pension board."⁴³ The answer was affirmative.⁴⁴

Concerning identity of parties, the court held:

It is immaterial that the pension board was not a party to the Industrial Accident Commission proceeding. The city, which is not only a party herein but the real party in interest, was also a party to and appeared in the prior proceeding. Under the city charter, the pension board acts as an agent of the city, and, in

38. 63 Cal. App. 2d at 446, 147 P.2d at 94.

39. *Id.*

40. 40 Cal. 2d 477, 254 P.2d 26 (1953).

41. *Id.* at 479, 254 P.2d at 27.

42. *Id.* at 479 n.1, 254 P.2d at 27 n.1.

43. *Id.* at 479, 254 P.2d at 27.

44. *Id.* at 482, 254 P.2d at 29.

this representative capacity, it is bound by the commission's decision if the city is bound.⁴⁵

Whether the pension board exercised quasi-judicial powers or was a mere administrative agent, performing ministerial tasks, was not important. "In either case, the doctrine of *res judicata* [collateral estoppel] is applicable"⁴⁶

Furthermore, collateral estoppel was not rendered inapplicable by the fact that the two tribunals employed different rules of procedure and evidence.⁴⁷

[A] difference in burden of proof does not justify any exception to the general rule of *res judicata* "All that is essential . . . is that a party should have been given one opportunity for the judicial determination of an issue by a tribunal having the requisite authority and proceeding in a manner recognized as due process of law."⁴⁸

The court denied that, in disapproving *Schmidt*, it stripped the pension board of requisite powers by allowing the judgment of another tribunal to supersede that of the board. There was no divesting of authority

except the power to make an independent finding on an issue of fact previously determined by another tribunal. This limitation is, of course, inherent in the doctrine and is a necessary result in every case in which it is applied.⁴⁹

French v. Rishell appears to be the definitive statement of California law on the application of collateral estoppel to situations in which an employee may be entitled to overlapping benefits under workmen's compensation and a county or municipal pension plan.⁵⁰ It is cited with approval, and its authority has not been openly challenged in the

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 481, 254 P.2d at 28. In the IAC proceeding, the widow's burden of proof was considerably less than that required by the pension board. In workmen's compensation cases, a presumption arises under CAL. LABOR CODE § 3212 that a heart condition sustained by a public employee arose out of and in the course of his employment. No such presumption is available to municipal pension boards. 40 Cal. 2d at 480, 254 P.2d at 28.

49. 40 Cal. 2d at 481, 254 P.2d at 29.

50. In response to the trial court's decision in *French v. Rishell*, section 249(3) of the Oakland City Charter was amended in 1951. The new provision states that "[n]o benefits shall be paid under this Article [covering the Police and Fire Retirement System] on the basis of an award by the Industrial Accident Commission of the State of California." Since the amendment was enacted, no case comparable to *French* has been adjudicated in which the provision was involved. The only case citing the amendment is *City of Oakland v. Workmen's Comp. App. Bd.*, 259 Cal. App. 2d 163, 170, 66 Cal. Rptr. 283, 288 (1968).

appellate courts.⁵¹

With the basic doctrine of collateral estoppel established, it is instructive to examine how subsequent cases have treated various aspects of the doctrine.

Identity of Issues—Finality of Judgment

To reiterate, three criteria must be satisfied if collateral estoppel is to be invoked:⁵²

(1) Was the issue decided in the prior adjudication *identical* with the one presented in the action in question?

(2) Was there a final judgment on the *merits*?

(3) Was the party *against* whom the plea is asserted a party or in privity with a party to the prior adjudication?

*DeCelle v. City of Alameda*⁵³ dealt with the first two criteria at length. As a fireman, DeCelle was covered both by workmen's compensation and a municipal retirement and disability pension.⁵⁴ In 1955, he suffered aggravation of a duodenal ulcer and was retired. He petitioned the pension board for a disability pension, but by mutual agreement consideration was postponed until his pending workmen's compensation claim was adjudicated. Almost 10 months later, the Industrial Accident Commission found that: (a) DeCelle had received an injury, *i.e.*, aggravation of the ulcer; (b) the injury "was caused by and arose out of his employment"; and (c) because of this injury, he was "permanently disabled from performing his duties as a member of said Fire Department"⁵⁵ After the city petitioned for reconsideration, the IAC rescinded its former findings and issued new findings and an award. The finding that "by reason of [his] injury, [DeCelle] was permanently disabled from performing his duties as a member of said Fire Department" was stricken.⁵⁶

Finally, in 1958, the pension board denied DeCelle a pension on

51. See, *e.g.*, *Dow Chem. Co. v. Workmen's Comp. App. Bd.*, 67 Cal. 2d 483, 432 P.2d 365, 62 Cal. Rptr. 757 (1967). There will be discussion later concerning possible erosion of *French's* authority by *Grant v. Board of Retirement*, 253 Cal. App. 2d 1020, 61 Cal. Rptr. 791 (1967), and *Petry v. Board of Retirement*, 273 A.C.A. 140, 77 Cal. Rptr. 891 (1969), in text accompanying notes 95-104 *infra*.

52. See text accompanying notes 20-22 *supra*.

53. 186 Cal. App. 2d 574, 9 Cal. Rptr. 549 (1960).

54. The relevant ordinance provides in part: "Should any member become physically disabled by reason of any injury received in or illness caused by or arising out of the performance of duty, the Board shall, upon the written request of said member, or his guardian, or without such request if it deems it for the good of the service, order that such member be retired from active service," *quoted in* 186 Cal. App. 2d at 581, 9 Cal. Rptr. at 554 (1960) (emphasis added).

55. *Id.* at 578, 9 Cal. Rptr. at 551.

56. *Id.* at 577, 9 Cal. Rptr. at 551.

the ground that he had not been "*physically disabled* by reason of an illness or injury caused by or arising out of the performance of his duties" ⁵⁷ The board rejected DeCelle's contention that the IAC's findings, including the stricken finding noted above, were binding on the board by collateral estoppel.

DeCelle successfully sought a writ of mandamus from the superior court to require the pension board to grant him an award, but the court of appeal reversed. The court quickly dispensed with DeCelle's argument that the stricken finding of the IAC was binding on the pension board. In the alternative, DeCelle argued that the IAC's award of a 55 percent *permanent* disability *necessarily* must have required a finding that DeCelle's ulcer had necessitated his retirement. The court, however, stated that there were many factors that went into an award of permanent disability by the IAC and that therefore "it cannot be said in lieu of a finding thereon that the commission based its award to [De Celle] on a determination that he could no longer pursue his former occupation."⁵⁸

Moreover, the court agreed with the pension board that a distinction "must be drawn between the meaning of the words 'physically disabled' in the [pension] ordinance and the words 'permanent disability' as used in the workmen's compensation statutes and by the commission in its decision."⁵⁹ "Physical disability" means disabled from returning to his previous employment, whereas "permanent disability" means any lasting and irreversible impairment, such as the loss of a toe or finger. Such impairment may or may not produce a loss of ability to work at the employee's former job.⁶⁰ Under this construction of the two statutes, held the court,

the board . . . was required to determine not only whether [DeCelle] had incurred the injury in the performance of duty, but also whether said injury had rendered him incapable of continuing his former employment. . . . [T]he commission's decision only determined the first of these two issues.⁶¹

Since the second issue before the board had not been adjudicated by the IAC, collateral estoppel could not apply.

Collateral estoppel was held inapplicable to the situation in *DeCelle* for the additional reason that the IAC's award was not a final judgment. The court held that the "commission had continuing jurisdiction for five years from the date of [DeCelle's] injury, or until . . . 1960, to

57. *Id.* (emphasis added).

58. *Id.* at 580-81, 9 Cal. Rptr. at 554.

59. *Id.* at 581, 9 Cal. Rptr. at 554.

60. *Id.* at 582, 9 Cal. Rptr. at 554-55.

61. *Id.*, 9 Cal. Rptr. at 555.

rescind, alter or amend its prior orders."⁶² During those five years, IAC orders were not final and could not be res judicata as to other tribunals. Therefore, the pension board was free to make an independent evaluation of DeCelle's application in 1958.⁶³

DeCelle quite correctly recognized that, under some circumstances, the IAC's jurisdiction continues for five years after the date of the injury.⁶⁴ Despite *DeCelle's* unequivocal holding that a workmen's compensation award is not final for the purposes of collateral estoppel until five years after the injury—a holding that has been cited with approval and followed by other courts of appeal⁶⁵—the case would appear to have been overruled by the recent supreme court decision in *Dow Chemical Co. v. Workmen's Compensation Appeals Board*.⁶⁶ In that case, it was held that the WCAB must give res judicata and collateral estoppel effect to its final decisions.⁶⁷ The supreme court apparently considered the time when a WCAB decision becomes final for the purposes of collateral estoppel to be well-settled law. It devoted just two sentences to a discussion of this point: "None of the parties to the cases . . . requested reconsideration by the WCAB. As a result, these awards became final."⁶⁸

This view has been reaffirmed in the recent court of appeal case of *Marsh v. Workmen's Compensation Appeals Board*.⁶⁹ In deciding whether the WCAB had to give res judicata effect to its prior decision in the case, the court of appeal expressly stated that "[a] decision of the Workmen's Compensation Appeals Board becomes final upon the expiration of the time for review."⁷⁰ WCAB decisions since *Dow Chemical* have been in harmony with this view.⁷¹

Although *Dow Chemical* concerned the application of collateral estoppel in subsequent WCAB proceedings, the decision would seem to apply with equal force to fact situations like *DeCelle* involving pension boards. If so, then the holding on finality in *DeCelle* is no longer the

62. *Id.* at 578-79, 9 Cal. Rptr. at 552-53.

63. *Id.* at 579-80, 9 Cal. Rptr. at 553.

64. CAL. LABOR CODE §§ 5803-05. Section 5410 establishes yet another ground for five years of continuing jurisdiction.

65. *Casualty Ins. Co. v. Industrial Acc. Comm'n*, 226 Cal. App. 2d 748, 757, 38 Cal. Rptr. 364, 370 (1964); *Solari v. Atlas-Universal Serv., Inc.*, 215 Cal. App. 2d 587, 594, 599, 30 Cal. Rptr. 407, 411, 414 (1963).

66. 67 Cal. 2d 483, 432 P.2d 365, 62 Cal. Rptr. 757 (1967).

67. *Id.* at 491, 432 P.2d at 370, 62 Cal. Rptr. at 762.

68. *Id.* at 488, 432 P.2d at 369, 62 Cal. Rptr. at 761 (emphasis added).

69. 257 Cal. App. 2d 574, 65 Cal. Rptr. 69 (1968).

70. *Id.* at 580, 65 Cal. Rptr. at 72.

71. *E.g.*, *Burris v. State Comp. Ins. Fund*, 33 Cal. Comp. Cases 419 (1968); *Big Ben Sash & Door Co. v. Workmen's Comp. App. Bd.*, 33 Cal. Comp. Cases 33 (1968).

law.⁷²

Identity of Parties

If collateral estoppel is to be invoked, not only must there be a prior, final adjudication of the precise issue in question; the party against whom the plea is asserted must have been a party, or in privity with a party, in the prior proceeding.

In determining identity of parties, close attention must be directed to any agency relationship existing between the county or municipality and the pension board in question. In *French v. Rishell*,⁷³ a municipal pension board was bound by a prior award by the IAC although technically it had not been a party to the proceeding. The board's absence was not important since it acted as an agent of the city of Oakland, which had been a party.⁷⁴ Moreover, it was immaterial whether the pension board was regarded

as a mere agent without authority to make any determinations of fact or as a local administrative body with power to make final determinations of fact. In either case, the doctrine of *res judicata* is applicable . . .⁷⁵

With the proliferation of municipal and county bodies—and their concomitant pension funds—privity may be quite difficult to establish. *Flaherty v. Board of Retirement*⁷⁶ illustrates the situation clearly. Flaherty was employed by the East Los Angeles Fire Protection District. Although the District is governed by the county board of supervisors acting *ex officio*, it is “not a department or agency of the County of Los Angeles but is a separate entity formed under state law.”⁷⁷ Disability pensions, are not administered by either the district or the county,⁷⁸ but by the Los Angeles County Employees Retirement Association, “an organization distinct from either the County of Los Angeles or the . . . District.”⁷⁹

As a fireman, Flaherty was “required” to engage in physical activities while on duty, including frequent games of volleyball. During one game, he badly injured a knee. The retirement association denied

72. For an excellent criticism of the position on finality subsequently adopted in *Dow Chemical*, see *Solari v. Atlas-Universal Serv., Inc.*, 215 Cal. App. 2d 587, 594-99, 30 Cal. Rptr. 407, 411-14 (1963).

73. 40 Cal. 2d 477, 254 P.2d 26 (1953).

74. *Id.* at 482, 254 P.2d at 29.

75. *Id.*

76. 198 Cal. App. 2d 397, 18 Cal. Rptr. 256 (1961).

77. *Id.* at 402, 18 Cal. Rptr. at 260. Under CAL. HEALTH & SAFETY CODE § 14451, district employees are not ipso facto employees of the county.

78. Enabling legislation is the County Employees Retirement Law of 1937, CAL. GOV'T CODE §§ 31450-898.

79. 198 Cal. App. 2d at 404, 18 Cal. Rptr. at 261.

his petition for a service-connected disability pension although the denial was without prejudice and, hence, not final. Upon petition for reconsideration, the association again denied the pension without prejudice. A year later, the IAC found that the injuries were service-incurred permanent disabilities and granted an award. Flaherty petitioned the association for reconsideration of his pension, contending that the IAC's finding was binding on the association by operation of collateral estoppel; but again, the petition was denied without prejudice.

Flaherty then sought mandamus to compel payment of the pension. In denying relief, the court held that the IAC's findings could not work a collateral estoppel. Only the fire district had been a party to the proceedings and no agency relationship was found between the district and the retirement association. Since the party against whom collateral estoppel was asserted was not linked to the IAC's proceedings by privity, the plea failed.⁸⁰

Recent Developments

If a local pension board retires an employee after finding that he sustained a service-connected disability, can a *subsequent* WCAB finding that the disability was not service-connected be pleaded as collateral estoppel, if the pension board later reviews the award during the exercise of its continuing jurisdiction?⁸¹ This question was posed in *Pathe v. City of Bakersfield*.⁸²

Until 1960, when he developed a heart condition, Pathe was a Bakersfield fireman. Although he promptly applied to the IAC for compensation benefits, no action was taken for nearly a year and a half. In the meantime, the board of trustees of the firemen's pension fund, acting on its own initiative, retired Pathe and awarded him a service-connected disability pension.⁸³ A month later, the IAC finally announced its finding that Pathe's heart condition did not arise out of his work.⁸⁴

80. *Id.* at 402-06, 18 Cal. Rptr. at 260-63. Because there was no identity of parties, the court found it unnecessary to discuss whether the IAC's award was a final judgment. *Id.* at 406 n.6, 18 Cal. Rptr. at 262 n.6.

81. For a typical provision concerning the exercise of continuing jurisdiction by a pension board, see text accompanying note 86 *infra*.

82. 255 Cal. App. 2d 409, 63 Cal. Rptr. 220 (1967).

83. Section 168(4) of the city charter authorizes the board to retire a disabled employee on its own motion: "Whenever any member of the Fire Department shall become disabled by reason of sickness caused by the discharge of the duties of such member in such Department and such disability shall continue for one (1) year or shall become so physically or mentally disabled as a result of such injuries or sickness as to render his retirement from active service necessary, the Pension Board shall order and direct that such member be retired," *quoted in* 255 Cal. App. 2d at 422, 63 Cal. Rptr. at 228.

84. The award was denied despite the presumption arising under CAL. LABOR CODE § 3212 that any heart condition developed by a fireman arises out of his work.

Pathe received his service-connected pension for nearly two years but in early 1963, an actuary for the pension fund chanced upon the IAC's adverse report and, upon advice of the city attorney, the pension board modified its former decision. Pathe's pension lost its service-connected status and his benefits were reduced from \$270.45 per month to \$135.22. In 1966, Pathe sought mandamus to compel restoration of his former pension. Mandamus was granted by the superior court and, upon appeal, was affirmed by a 3-2 decision.⁸⁵

After the pension board had retired Pathe, it retained continuing jurisdiction by virtue of section 168(4) of the city charter, which provided that

any such retirement allowance shall cease when the member's disability ceases and, in such event, such member shall be restored to the same rank or position which he held at the time of retirement.⁸⁶

Counsel for the board argued that modification of Pathe's pension in 1963 constituted a subsequent civil action to which collateral estoppel was applicable.⁸⁷ Therefore, regardless of its former action, the pension board was bound by the IAC's prior finding that Pathe's heart condition was not service-connected.⁸⁸

The court found that this contention was "entirely without merit."⁸⁹ The pension board's continuing jurisdiction was confined to terminating pensions "when the member's disability ceases";⁹⁰ it did *not* empower the board to reconsider whether the disability which originally prompted retirement of an employee was service-incurred. If the pension board *were* compelled to honor the IAC's findings under collateral estoppel while exercising its continuing jurisdiction, collateral estoppel would, *in effect*, apply *retrospectively*.⁹¹ This would be a contradiction in terms; collateral estoppel, by definition, is restricted to issues "*previously* determined by another tribunal."⁹² Not only would this violate the doctrine's very essence, it could perpetrate gross injustice. If "a decision of the retirement board to retire an employee on a service-connected pension" were subject to reversal at some future date, the possibility of reduced payments and potential refunds "could create an undue burden on an employee who retired under compulsion without

85. 255 Cal. App. 2d 409, 412, 421, 63 Cal. Rptr. 220, 221, 227 (1967).

86. *Id.* at 422, 63 Cal. Rptr. at 228.

87. Brief for Appellant at 9, *Pathe v. City of Bakersfield*, 255 Cal. App. 2d 409, 63 Cal. Rptr. 220 (1967).

88. *Id.* at 27-29.

89. 255 Cal. App. 2d at 417, 63 Cal. Rptr. at 225.

90. *Id.* at 422, 63 Cal. Rptr. at 228 (emphasis added).

91. *Id.* at 417, 63 Cal. Rptr. at 225.

92. *French v. Rishell*, 40 Cal. 2d 477, 481, 254 P.2d 26, 29 (1953) (emphasis added).

appealing or challenging the retirement board's decision."⁹³

A Retreat from *French v. Rishell*?

Until 1967, application of the collateral estoppel doctrine appeared to conform to the criteria described previously, but between 1967 and 1969, two appellate court cases were decided which *may* alter the situation significantly.⁹⁴ Each dealt with fact situations similar to those in *Flaherty*.

In *Grant v. Board of Retirement*,⁹⁵ the plaintiff was the Kern County building inspector. Disability pensions for county employees were administered by the Kern County Employees Retirement Association, a body which appeared comparable to the retirement association discussed in *Flaherty*.⁹⁶ Grant suffered two heart attacks, which the IAC found to be service-connected. The retirement association disregarded this holding and refused to grant a service-connected disability pension. In denying mandamus to enforce payment of the pension, the court of appeal, citing *Flaherty*, held:

At the outset, it should be noted that the Industrial Accident Commission, . . . previously made an award at complete variance with the finding of the . . . Board of Retirement. Such a determination by the Industrial Accident Commission is not, however, binding upon the retirement board, or, in other words, it is not res adjudicata as to the question of whether the present disability of the petitioner was caused as a result of, or in the course of his employment by the County of Kern. *The retirement board had valid, independent rights with respect to determining whether the petitioner suffered injury in the course and within the scope of his employment . . .*⁹⁷

Quite possibly, the court meant to do no more than affirm the holding in *Flaherty* concerning identity of parties.⁹⁸ If so, the court did not mention the issue directly, much less emphasize it. Instead, it spoke of the board's "valid, independent rights," which might imply that de-

93. 255 Cal. App. 2d at 417, 63 Cal. Rptr. at 225.

94. See note 51 *supra*.

95. 253 Cal. App. 2d 1020, 61 Cal. Rptr. 791 (1967).

96. Compare *id.* at 1023, 61 Cal. Rptr. at 793, with *Flaherty v. Board of Retirement*, 198 Cal. App. 2d 397, 402, 18 Cal. Rptr. 256, 260 (1961). In *Flaherty*, the enabling legislation was CAL. GOV'T CODE §§ 31450-898.

97. 253 Cal. App. 2d at 1021, 61 Cal. Rptr. at 791-792 (1967) (emphasis added).

98. Judge Conley wrote the opinion in *Grant*. Two months later, he registered a vigorous dissent in *Pathe v. Bakersfield*, discussed in text accompanying notes 82-131 *infra*, in which he contended that a decision of the IAC *should* have been given collateral estoppel effect by a *municipal* pension board. 255 Cal. App. 2d 409, 424-425, 63 Cal. Rptr. 220, 229 (1967). This tends to weaken the inference that a *county* pension board is wholly and forever free from such collateral estoppel.

terminations of fact by the IAC are not binding on the board, even if all requirements for collateral estoppel have been met.

This implication is strengthened if *Grant* is studied in conjunction with *Petry v. Board of Retirement*.⁹⁹ Petry, a deputy sheriff for Los Angeles County, was injured in a training exercise in 1961 and was able to work only sporadically thereafter. In 1965, the IAC found that Petry's disability was permanent and service-incurred.¹⁰⁰ Later the Los Angeles County Employees Retirement Association, the same body involved in *Flaherty*, disregarded the IAC's findings and denied Petry a service-connected pension.

Petry's petition for mandamus was denied. The court stated:

The Retirement Board is a quasi-judicial body. In reviewing the evidence presented to the Board, neither the superior court nor this court on appeal may weigh the evidence. . . . [All] "conflicts in the evidence must be resolved in favor of that decision and all legitimate and reasonable inferences must be indulged in its support."¹⁰¹

Moreover, assertion of collateral estoppel was without merit.¹⁰²

In any event, it is settled that "a determination by the Industrial Accident Commission is not, however, binding upon the retirement board The retirement board had valid, independent rights with respect to determining whether petitioner suffered injury in the course and within the scope of his employment" ¹⁰³

Petry, like *Grant*, could have reached its decision on the basis of the reasoning in *Flaherty* that there was no identity of parties. Neither did so expressly. Taken together, their references to "valid, independent rights" and the court's incapacity to evaluate evidence which was before the retirement board is strongly reminiscent of the long-discredited *Schmidt v. Pension Board*. *Schmidt* also justified exemption of a pension board from collateral estoppel on the ground that "an appellate court has no power to set aside findings of a judicial body vested with fact finding power when such findings are based on conflicting evidence."¹⁰⁴ Since *Schmidt* was expressly overruled by *French v. Rishell*, *Grand* and *Petry* may well portend erosion of *French's* authority.

The merit of such a development is dubious, however. If county and municipal pension boards were exempted from the doctrine of

99. 273 A.C.A. 140, 77 Cal. Rptr. 891 (1969).

100. *Id.* at 142, 77 Cal. Rptr. at 892.

101. *Id.* at 143, 77 Cal. Rptr. at 892-93, quoting *Marcucci v. Board of Equalization*, 138 Cal. App. 2d 605, 608, 292 P.2d 264, 266 (1956).

102. *Petry* conceded this to the trial court. 273 A.C.A. at 144, 77 Cal. Rptr. at 893.

103. *Id.* at 144-45, 77 Cal. Rptr. at 894, quoting *Grant v. Board of Retirement*, 253 Cal. App. 2d 1020, 1021, 61 Cal. Rptr. 71, 71-72 (1967). *Flaherty* was also cited.

104. 63 Cal. App. 2d 439, 446, 147 P.2d 90, 94 (1944).

collateral estoppel despite their quasi-judicial status, they would possess autonomy which is denied even to the courts.

Pension Board Findings Cannot Be Invoked As Collateral Estoppel in Workmen's Compensation Proceedings

Since a pension board with factfinding powers is a quasi-judicial body, its final determinations of fact have been held binding upon the courts.¹⁰⁵ Pension board decisions, however, have never been accorded *res judicata* status in workmen's compensation proceedings. This result seems strongly discouraged, if not precluded outright, by the constitution, the Labor Code, and local charters or ordinances.

Article 20, section 21 of the California Constitution specifies that the workmen's compensation apparatus to be established by statute shall accomplish "substantial justice in all cases . . . *without incumbrance of any character.*"¹⁰⁶ The Labor Code conferred exclusive jurisdiction upon the IAC for adjudication of "the recovery of compensation, or concerning any right or liability arising out of or incidental thereto."¹⁰⁷ Moreover, it is not uncommon for the charters and ordinances creating pension funds to so delimit their jurisdiction that it in no way interferes with deliberations of the IAC.¹⁰⁸

Conclusion

Grant and Petry notwithstanding,¹⁰⁹ *French v. Rishell* still appears to be California's most definitive statement of the collateral estoppel effect that WCAB decisions have upon the deliberations of county and municipal pension boards. If the criteria in *Bernhard v. Bank of America* are satisfied, a prior decision of the WCAB is binding upon a pension board by collateral estoppel. Conversely, no case has seriously suggested that a prior pension board decision can be pleaded as collateral estoppel against the WCAB.

Although the doctrine of collateral estoppel has been clearly defined, its application may be quite difficult in practice. Of the six cases reaching the appellate courts in recent years in which the issue

105. See cases cited note 14 *supra*.

106. Emphasis added.

107. CAL. LABOR CODE § 5300.

108. Illustrative of such draftsmanship is section 179(5) of the Bakersfield city charter which, in dealing with the Firemen's Pension Fund, states: "The provisions of the foregoing sections shall in no way alter, modify, change, or abrogate any of the terms, conditions, or provisions of that certain act of the legislature known and referred to as the Workmen's Compensation, Insurance and Safety Act or any amendments thereto," *quoted in* *Pathe v. City of Bakersfield*, 255 Cal. App. 2d 409, 416, 63 Cal. Rptr. 220, 223 (1967).

109. See text accompanying notes 95-104 *supra*.

was whether WCAB decisions worked a collateral estoppel on local pension boards,¹¹⁰ only one actually found that all of the requisite conditions for invoking the doctrine were present.¹¹¹ This does not necessarily indicate that courts are reluctant to apply the doctrine; the facts in each particular case substantiated the court's holding. Nor is it in any way definitive of the manner in which local boards employ collateral estoppel in the overwhelming majority of cases that never reach the appellate courts. What seems abundantly clear is that if an injured employee seeks to employ collateral estoppel, he must satisfy the criteria of *Bernhard v. Bank of America* meticulously.

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110. *French v. Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953); *Petry v. Board of Retirement*, 273 A.C.A. 140, 77 Cal. Rptr. 891 (1969); *Pathe v. City of Bakersfield*, 255 Cal. App. 2d 409, 63 Cal. Rptr. 220 (1967); *Grant v. Board of Retirement*, 253 Cal. App. 2d 1020, 61 Cal. Rptr. 791 (1967); *Flaherty v. Board of Retirement*, 198 Cal. App. 2d 397, 18 Cal. Rptr. 256 (1961); *DeCelle v. City of Alameda*, 186 Cal. App. 2d 574, 9 Cal. Rptr. 549 (1960).

111. *French v. Rishell*, 40 Cal. 2d 477, 254 P.2d 26 (1953).

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